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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIA JUANA RASMUSSEN,

Defendant and Appellant.

E046493

(Super.Ct.No. FBA700075)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Miriam I. Morton, Judge. Affirmed.

The Kavinsky Law Firm and Mark McBride for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and James D. Dutton and Melissa Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Maria Juana Rasmussen received a citation from a Barstow police officer for parking her car in a red zone. When she pulled away from the curb, her

vehicle hit the back of the leather duty belt worn by the officer. She was charged and convicted by a jury of assault on a peace officer by force likely to produce great bodily injury. (Pen. Code, § 245, subd. (c).)<sup>1</sup> She was placed on three years' probation, conditioned upon the performance of 250 hours of community service and completion of an anger management program.

On appeal, defendant contends: (1) the court erred in denying her motion for new trial because the evidence was insufficient to support the verdict, and (2) prosecutorial misconduct deprived her of a fair trial. We reject these contentions and affirm the judgment.

## I. SUMMARY OF FACTS AND PROCEDURAL HISTORY

### A. *Prosecution Evidence*

Cheran Jackson was a school resource officer with the Barstow Police Department. On March 7, 2007, she pulled up behind two vehicles parked in a red zone outside Barstow Junior High School. The car immediately in front of her patrol car was the defendant's Chevrolet Silverado truck. The second vehicle, a white truck owned by Ole Olson, was parked in front of the Silverado. Defendant was standing on the sidewalk next to the Silverado.

Jackson approached defendant and asked defendant if the Silverado was her vehicle. Defendant responded in an angry tone of voice: "Yes. Do you know who I

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

am?”<sup>2</sup> Jackson said she did not know who defendant was, explained that she was parked in a red zone, and proceeded to fill out a parking citation. Defendant asked Jackson for her badge number. Jackson gave her the number and said it would be on the citation. At trial, Jackson described defendant as “[e]xtremely angry.” Defendant grabbed the citation from Jackson’s hand. Defendant then got into her car. Olson, the owner of the white truck, observed the conversation between Jackson and defendant and testified that defendant “seemed really agitated.” Although he did not hear what was said, he did hear “raised voices.”

Jackson turned her attention to Olson. Jackson was standing on the driver’s side of Olson’s truck near the back bumper and brake light. There was approximately four or five feet, or one-half of a vehicle’s length, between Olson’s truck and defendant’s Silverado. As defendant initially pulled away from the curb, she steered the Silverado to the left. Jackson described what happened next: Defendant “yanked the steering wheel towards my direction and towards the other vehicle. [¶] . . . [¶] As I observed her and also heard the tires and asphalt grinding, she struck the back of my handcuff case and drug [*sic*] me, turning me, not giving me room as I had to tippy-toe and hold on for dear life, grabbing the back of the truck, as my nameplate went directly down the back of the

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<sup>2</sup> On cross-examination, defense counsel elicited from Jackson a different description of the initial interaction. With her memory refreshed by a police report prepared by another officer, she stated that defendant asked Jackson at some point: “Are you going to write me a cite?” Jackson told her that she was. Defendant then asked Jackson: “Are you kidding me?” The other officer’s police report did not include any reference to the statement: “Do you know who I am?”

bed of the truck.” She further explained that the Silverado hit her in the back, caught her leather gear, and spun her around to where she could grab onto the bed of the Silverado as defendant drove away. She described herself as being “pinned” between the two vehicles and said she could not move fast enough to get out of the way.

Olson testified that he was walking away from Jackson to get his vehicle registration and proof of insurance when the Silverado hit Jackson. He heard tires “spinning” or “turning,” and the gravel moving “like somebody was speeding away.” When he turned to look, he saw Jackson holding onto the Silverado, and almost falling to the ground.

Jackson then yelled at defendant: “Stop! Stop! You hit me.” She ran to the driver’s side of the Silverado and reached into the car to put it into park. Defendant was holding her cell phone and told Jackson that she was on the phone. Jackson told defendant to get out of the vehicle. When Jackson told defendant that she had hit her, defendant responded: “I’m on the phone with my husband.” According to Jackson, defendant was behaving “[a]s if I was bothering her.” Olson testified that defendant was both “[a]gitated” and acting “nonchalant, like it didn’t even [faze] her,” and “it just looked like it was a big bother to her.”

Jackson then pulled defendant out of the Silverado. Defendant yelled at Jackson: “I’m on the phone. You don’t know who I am.” She also kept trying to tell Jackson that she was related to someone in Jackson’s department. At trial, Jackson described

defendant as “[e]xtremely uncooperative,” and said that she had to use a “control hold” on defendant to place her in handcuffs.

Jackson placed defendant in the back of the patrol car and called dispatch to report that she had been hit by a vehicle. At trial, Jackson could not recall defendant apologizing to her. However, she did not dispute a statement in the arresting officer’s report that Jackson told the arresting officer that defendant yelled, “I’m sorry[,] I’m sorry,” as she was being placed in the patrol car.

Photographs were introduced at trial showing paint from defendant’s vehicle on Jackson’s handcuff case and flashlight. Other pictures showed paint marks on her belt where leather had been stripped away and a leather scuff mark on the Silverado. Jackson also testified that her handcuff case made a dent in the Silverado and that her nameplate created a long scratch along the side of the vehicle.

#### *B. Defense Evidence*

Defendant is a sister-in-law of Caleb Gibson, Barstow’s Chief of Police at the time of the incident.

She testified that she drove the Silverado to the junior high school to bring lunch to her son. She parked in a red zone. Jackson approached her and defendant asked Jackson if she was going to give her a ticket. The officer made a gesture indicating, “What does it look like I’m doing.” Defendant said, “Man, you got to be joking,” to which the officer responded, “[I]ook like I’m joking.” Defendant was upset about getting

a ticket, but denied yelling at the officer and denied ever saying, “Do you know who I am.”

As defendant pulled away from the curb, the officer was standing by the rear tire of the white truck. Defendant heard something, put on the brake, and stopped. She heard the officer say, “Stop! You hit me.” Defendant denied that she was acting nonchalant and testified that she was talking on her cell phone because her husband called her. After she was handcuffed and the officer called in to report that she had been hit, defendant asked the officer if she could speak with “Officer Gibson.” She did not tell the officer about her relationship with Gibson.

Gibson heard the report of an officer being hit and went to the scene. He was shocked to find his sister-in-law in the backseat of the police car. Defendant was crying and emotionally upset. Defendant told Gibson that it was an accident and she was sorry. Gibson testified that he knows defendant very well and described her as humble, quiet, and shy, “almost like a church mouse.”

Defendant’s son was in the seventh grade at the time of the incident and in the eighth grade at the time of trial. He testified that he saw his mother (the defendant) pull away from the curb slowly. He saw the officer take a step backwards and hit the Silverado. The officer was yelling at his mom. He saw his mom get handcuffed and heard her say, “I’m sorry.” She was crying.

Defendant testified that there was a six-inch black scuff mark on the Silverado, but no marks on the passenger side front door, no scratch caused by Jackson’s name tag, and

no dent in the vehicle. The scuff mark was removed when the truck was washed.

Defendant's husband testified that there were no dents or scratches in the Silverado, and that a four-inch scuff mark was removed with a wet rag.

Defendant denied that she yanked or pulled the steering wheel toward Jackson and stated that she did not intend to strike the officer. She hit Jackson "[a]ccidentally."

Following the verdict, defendant moved for a new trial on the ground that the verdict was contrary to law and the evidence. Following a hearing, the court denied the motion.

Additional facts will be discussed below where relevant.

## II. ANALYSIS

### A. *Denial of Motion for New Trial and Sufficiency of the Evidence*

Defendant moved for a new trial pursuant to section 1181, clause 6, which allows a trial court to grant a motion for new trial when "the verdict or finding is contrary to law or evidence . . . ." The trial court denied the motion.

When a defendant moves for a new trial on the ground that the verdict is contrary to the evidence, the "trial court must review the evidence independently, considering the proper weight to be afforded to the evidence and then deciding whether there is sufficient credible evidence to support the verdict." (*People v. Lewis* (2001) 26 Cal.4th 334, 364; see *People v. Robarge* (1953) 41 Cal.2d 628, 634.) If the trial court denies the motion, our review of the court's order is limited to determining whether a manifest and unmistakable abuse of discretion clearly appears from the record. (*People v. Lewis*,

*supra*, at p. 364; *People v. Staten* (2000) 24 Cal.4th 434, 466.) No such abuse of discretion appears when the evidence is sufficient to support the verdict. (*People v. Lewis*, *supra*, at p. 365; *People v. Diaz* (1983) 140 Cal.App.3d 813, 826.)

In evaluating the sufficiency of the evidence, we examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) “[T]he testimony of a single witness is sufficient for the proof of any fact.” (*People v. Richardson* (2008) 43 Cal.4th 959, 1030-1031.) Particularly important to our review in this case, we cannot “reweigh the evidence, resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of witnesses.” (*People v. Little* (2004) 115 Cal.App.4th 766, 771; see also *People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

Defendant was convicted of violating section 245, subdivision (c), which makes it a crime for any person to commit “an assault . . . by any means likely to produce great bodily injury upon the person of a peace officer . . . [when the person] knows or reasonably should know that the victim is a peace officer . . . engaged in the performance of his or her duties, when the peace officer . . . is engaged in the performance of his or her duties . . . .” An assault is “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240.)

Initially, we note that there is no dispute that defendant knew that Jackson was a peace officer engaged in the performance of her duties as such. Nor is it disputed that the jury could find that willfully driving a Chevrolet Silverado at another constitutes a means likely to produce great bodily injury or that defendant, as the driver of the Silverado that actually hit Jackson's gear belt, had the present ability to cause such injury. The only issue that appears to be in dispute on appeal was whether defendant acted with the requisite mental state for assault.

Assault does not require any specific intent to injure the victim. (*People v. Williams* (2001) 26 Cal.4th 779, 788.) The defendant must, however, "actually know[] those facts sufficient to establish that his [or her] act by its nature will probably and directly result in physical force being applied to another, i.e., a battery. [Citation.] In other words, a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his [or her] conduct. He [or she] may not be convicted based on facts he [or she] did not know but should have known. He [or she], however, need not be subjectively aware of the risk that a battery might occur." (*Ibid.*, fn. omitted.)

Jackson testified that she saw defendant turn the steering wheel toward her just before the Silverado hit her. Such testimony, particularly when viewed in light of evidence of defendant's anger and hostility toward Jackson immediately before hitting her, easily supports the requisite intent for assault. The jury could thus reasonably conclude that defendant was aware that she was driving her vehicle in a manner which

would lead a reasonable person to realize that a battery would directly, naturally, and probably result from her conduct.

Defendant's argument concerning the sufficiency of the evidence is based primarily upon the assertion that Jackson's "testimony was wildly inconsistent and unreliable." In particular, she argues: (1) Jackson's testimony regarding a scratch made on the Silverado by her name plate was unsupported by photographs and contradicted by testimony of others who said there was no scratch; (2) Jackson's statement that her handcuff case made a dent in the car was not corroborated by other evidence and was contradicted by testimony of others; (3) Jackson's testimony that defendant said, "Don't you know who I am," was not reflected in the arresting officer's report; (4) Jackson's description of being "pinned" between the two trucks stands "in stark contrast" to Olson's testimony that there was four or five feet between the two trucks; (5) Jackson was inconsistent as to whether defendant apologized to her; (6) Jackson's testimony that defendant did not come to a full stop is not accurate because other evidence suggests that defendant did come to a full stop, but merely failed to set the vehicle in park; and (7) Jackson's assertion that she saw defendant pull away from the curb and turn towards her is contrary to other evidence that she had her back to defendant's vehicle.

Defendant calls upon us, in essence, to find that Jackson's testimony lacked credibility and to reweigh the evidence, resolving conflicts in the evidence in her favor.

As explained above, however, our standard of review does not permit us to do so.

"Conflicts and even testimony which is subject to justifiable suspicion do not justify the

reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.” (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

Moreover, most of the inconsistencies and purported conflicts that defendant points to relate to facts that have little bearing on whether defendant committed the charged crime. Indeed, even if the jury could not rationally have believed Jackson’s testimony regarding the existence of a scratch or dent in the Silverado, that she was pinned between the vehicles, that defendant asked if Jackson knew who she was, that defendant did not come to a complete stop, or that defendant did not apologize for hitting her, the evidence that defendant drove toward Jackson and hit the officer, in light of all the evidence presented, is sufficient to support a reasonable inference that defendant had the requisite mental state.

The one point that warrants additional discussion is defendant’s argument that Jackson could not have seen defendant pull away from the curb and turn towards her because Jackson had her back to defendant’s vehicle. These facts are not inconsistent. As Jackson explained when cross-examined on this point, she was standing next to and facing Olson’s white truck; when she heard the noise from defendant’s tires, she “looked over with [her] head. [She] did not turn [her] body.” Thus, she could see defendant driving toward her and still be hit in the back. Defendant acknowledges this possibility, but argues that if there were four or five feet between the two vehicles as Olson testified, “there would have been no reason for her to stand so close to the [Silverado] if she had

seen the [Silverado] approach. The only explanation for [defendant's Silverado] coming in contact with Officer Jackson's duty gear . . . was that Officer Jackson's back was turned and she did not see the car coming." This argument assumes that there were four or five feet between the two vehicles and that Jackson would have taken evasive action to avoid getting hit if she had actually seen the Silverado coming at her. Because she was in fact hit, the argument goes, she must not have seen the vehicle coming at her. To the extent this explanation has any persuasive value, it is one that is properly made to the jury. It is also an argument that the jury could easily reject, in light of evidence that Jackson did not have the time or space to avoid being hit by defendant's Silverado.

Because there was sufficient evidence before the jury to convict defendant of the charged crime, the trial court did not abuse its discretion in denying defendant's motion for new trial.

#### *B. Prosecutorial Misconduct*

Defendant contends that prosecutorial misconduct deprived her of a fair trial. We reject the argument.

A prosecutor's conduct violates California law if it involves the use of deceptive or reprehensible methods to attempt to persuade the jury. (*People v. Benavides* (2005) 35 Cal.4th 69, 108.) It violates the United States Constitution "when it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) "In either case, only misconduct that prejudices a defendant

requires reversal [citation], and a timely admonition from the court generally cures any harm. [Citation.]” (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375.)

Defendant refers us to the following portion of the prosecutor’s closing argument: “She’s going to argue this is an accident. Guess what? She’s still accountable. And it’s in one of the jury instructions, which if you want to hear it all again, you come back out when you’re in there and you want to hear the jury instruction read to you again, it’s [Judicial Council of California Criminal Jury Instructions, CALCRIM No.] 830. And [CALCRIM No.] 830 says there is no intent requirement. She does not have to intend to hit the officer. If she hits the officer because of her actions, she is accountable by getting in that car angry and turning the wheel in even if she just meant to scare the officer or even if it was an accident, she needs to be held accountable according to the law.”

Defendant argues that these statements misstate the law because an assault requires a willful act, and an accident is not a willful act. Defendant did not object to the prosecutor’s comments or ask for a curative instruction or admonition. A “defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]’ [Citation.]” (*People v. Stanley* (2006) 39 Cal.4th 913, 952.) Accordingly, defendant’s claim on this point is forfeited.

Moreover, to the extent that the prosecutor misstated the law, no prejudice is shown. Defendant does not dispute that the jury was properly instructed as to the

requirement of willfulness for assault.<sup>3</sup> The jurors were further instructed: “You must follow the law as [the court] explain[s] it to you, even if you disagree with it. If you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.” In addition, the jurors were instructed that “[n]othing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence.” Finally, in his closing argument, defendant’s counsel responded directly to the prosecutor’s statement: “[The prosecutor] told you—just now, even if it’s an accident, doesn’t matter. She’s still guilty and needs to be held accountable. It’s not actually a correct statement of the law because you heard the judge tell you about the words intent, willful and purpose—on purpose. If the act of grabbing the wheel and pulling it to the side toward where the officer was, was intentional, then it doesn’t matter whether it was an accident that she actually struck the officer. The fact is that if she wasn’t paying attention, had no ill will towards the officer, didn’t actually intend to pull the wheel toward the officer and this was a complete accident, she’s not guilty of anything. And that’s what this is. It was an accident.” Based on the court’s instructions and the defense counsel’s statements, any misstatement by the prosecutor on this point was not prejudicial.

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<sup>3</sup> The jury was instructed: “To prove that the defendant is guilty of this crime [of assault with force likely to produce great bodily injury on a peace officer], the People must prove that: [¶] ‘1: The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury[.]’”

Next, defendant points to the following statement by the prosecutor: “A police report . . . is not evidence. There is no police report in this case that is evidence. All of the things that [defense counsel] read to you that allegedly are from the police report, not evidence. All of the things he asked the officer, didn’t you say this or this and it’s in this police report, this police report is not evidence . . . . Nothing you’ve heard about it is evidence, nothing about it is evidence.” At that point, defense counsel objected on the ground that the prosecutor’s statement was an incorrect statement of law. The matter was discussed among the court and counsel, where the court said that the “report itself is not evidence,” but “[w]hat [witnesses] testify to regarding the report is evidence.” The prosecutor agreed to clarify. The prosecutor then resumed her argument to the jury: “The police report . . . , you are not going to see it. You are not going to read it because it is not evidence. Now, if someone is sitting on that witness stand and says that something in it is evidence, or something in it is true, that is evidence because the only things that are evidence are the things you heard from this witness stand, things you see in the pictures and things that happened that day.” There was no further objection by defense counsel.

According to defendant, the “prosecutor deliberately defied the instruction of the Court to confirm her misstatement of the law to the jury, suggesting that she was right even when the Court informed her she was not.” We disagree. As the trial court acknowledged, the police report itself was not evidence. To the extent that the prosecutor’s statement that *nothing* about the police report is evidence was incorrect

(because Jackson agreed that certain statements in the report were true), the prosecutor properly clarified the matter. There was no misconduct.

Next, defendant contends that certain statements by the prosecutor concerning the circumstantial evidence instruction constitute misconduct. The prosecutor stated: “In this jury instruction, . . . it’s about circumstantial evidence. And it specifically says, . . . ‘If you can draw on two or more reasonable conclusions from the circumstantial evidence and one points to innocent [*sic*] and the other to guilt, you must accept the one that points to innocence.’ Ladies and gentlemen, circumstantial evidence. That’s not what we have in this case. We have direct evidence. We have testimony from the stand of what happened. We have pictures. We have physical evidence. Everything in this case you have directly right in front of you. It’s not circumstantial evidence, and this [instruction] doesn’t apply.” Defense counsel interposed an objection on the ground that this misstated the facts, which the court sustained.

Defendant complains on appeal that “there was no clarification, for the benefit of the jury, why it was a misstatement. As such, the prosecution once again misinformed the jury . . . .” However, defense counsel did not request a clarification or curative instruction from the court. The failure to do so forfeits the argument on appeal. Even if it was not forfeited, there is no basis for finding any prejudicial misconduct. The jurors were instructed to decide “what the facts are [and to] follow the instructions that do apply to the facts as [they] find them.” They were properly instructed as to circumstantial evidence. They will presumably follow the instructions given. (*People v. Avila* (2009))

46 Cal.4th 680, 719.) Defendant’s speculation otherwise is insufficient to establish prejudice.

Next, defendant contends the prosecutor asked “inherently objectionable questions” about defendant’s relationship with the former police chief. Although this point is not supported with citation to the record, she appears to be referring to the questions asked during the prosecutor’s cross-examination of defendant. To place the cross-examination in context, we note that defendant testified on direct examination that she asked Jackson if she could speak to “Officer Gibson.” She further testified that she never told anyone that Gibson would “get [her] out of this,” and did not “throw out his name.” She explained that Gibson is a “modest man” and she did not “want to embarrass him.”

The following then took place on cross-examination of defendant:

“[PROSECUTOR:] Why did you tell Officer Jackson that you knew someone in the department?

“[DEFENSE COUNSEL]: Objection. Misstates her testimony.

“THE COURT: Sustained.

“[PROSECUTOR:] Did you not testify earlier that you said that you knew—you told Officer Jackson that you knew someone in the department?

“[DEFENSE COUNSEL]: Objection. Misstates her testimony.

“[PROSECUTOR]: It’s a question.

“THE COURT: Overruled.

“THE WITNESS: After she handcuffed me, I felt helpless, and I asked to speak to Officer Lee Gibson.

“[PROSECUTOR:] Why did you ask to speak to him?

“[WITNESS:] I feel helpless. I have never been arrested in my life.

“[PROSECUTOR:] Did you think that he would come help you get out of trouble?

“[WITNESS:] I was hoping that he would listen to what happened and to her side and my side and maybe—I don’t know.

“[PROSECUTOR:] Did you think that if he came, maybe you wouldn’t be arrested?

“[WITNESS:] Yes. [¶] . . . [¶]

“[PROSECUTOR:] [Defendant], you said before you didn’t want to embarrass Officer Gibson; is that right?

“[WITNESS:] Yes.

“[PROSECUTOR:] Did you think the fact that you just hit one of his officers with your car might embarrass him?

“[WITNESS:] No.

“[PROSECUTOR:] You didn’t think that might make him look bad?

“[WITNESS:] Yeah, of course, because he is related to the family.

“[PROSECUTOR:] But you still asked that he be called to come to the scene?

“[WITNESS:] Yes.

“[PROSECUTOR:] Now, you also testified that you don’t like to use Officer Gibson’s name and you don’t like to use his position; is that right?

“[WITNESS:] Yes.

“[PROSECUTOR:] Then why are you having him come in to court to testify on your behalf?

“[DEFENSE COUNSEL:] Objection.

“THE COURT: Sustained.

“[PROSECUTOR:] Is Officer Gibson going to come to court and testify in this case?

“[WITNESS:] Yes.

“[PROSECUTOR:] Do you know why?

“[DEFENSE COUNSEL:] Objection. Relevance.

“THE COURT: Sustained.

“[PROSECUTOR:] Whose idea was it to have him testify?

“[DEFENSE COUNSEL:] Objection. Relevance.

“THE COURT: Sustained.”

No admonishment was requested by defense counsel.

From our review of the record, it appears that questions that were arguably objectionable were objected to by defense counsel and sustained by the court; however, asking questions that are objectionable does not necessarily constitute prosecutorial misconduct or deprive defendant of a fair trial. Moreover, the failure to request an

admonishment forfeits the issue on appeal. (See *People v. Cooper* (1991) 53 Cal.3d 771, 822-823.) Viewing the prosecutor's questions in context of the entire record, we conclude that the prosecutor's questions do not amount to prejudicial misconduct.

Finally, defendant asserts the prosecutor improperly used an overhead projection of a photograph of the Silverado. During the prosecutor's direct examination of Jackson concerning an overhead projection of a photograph of the Silverado, Jackson testified her handcuff case caused a dent in the Silverado. However, according to defendant, the actual photograph does not show any dent. Following Jackson's testimony, the court and counsel discussed the difference between the photograph and the overhead projection of the photograph. The court made these comments: "From the bench looking at the overhead projector, it looks like there is a dent where the scuff mark is. Looking at the picture in my hand, it's much clearer what looks like a dent because of a discoloration is the different reflections because you have the shadows of two people. But when the officer testified with the picture on the projector, it does look as if there's a dent. A dent, I don't see holding this picture and looking at it." The court resolved the issue by informing counsel that defense witnesses can testify that there was no dent in the car and "the picture can go through the jury and be pointed out to the jury."

On appeal, defendant asserts the prosecutor knew that the photograph does not show a dent and that allowing Jackson to testify to the existence of a dent was disingenuous and misleading. We disagree. When the prosecutor showed the projection of the photograph during trial, the following colloquy took place:

“[PROSECUTOR:] Tell us what this photograph shows.

“[WITNESS:] The leather transferred on to her vehicle.

“[PROSECUTOR:] I’m going to bring you the pointer here. Can you point out for us in this photograph where the leather transfer is.

“[WITNESS:] This line going directly across, there’s also an indentation where my handcuff case initially indented her vehicle.

“[PROSECUTOR:] Okay. So the handcuff case that you’ve shown us that was on your back, that actually left a dent in that vehicle?

“[WITNESS:] Yes, it did.”

Initially, it is not apparent from our record that the prosecutor was aware of the difference in appearance between the projection of the photograph and the photograph at the time she used the overhead projection and questioned Jackson about it. Defendant’s assertion of the prosecutor’s prior knowledge thus appears to be conjecture. Second, even if a dent is not visible in the actual (unprojected) photograph and the prosecutor was aware of this at the time, our reading of the record indicates that the prosecutor showed the picture to elicit from Jackson the fact of the leather scuff mark on the car. Jackson identified the scuff mark, then volunteered that her handcuff case also dented the vehicle. The prosecutor then followed up with a question about the handcuff case leaving a dent. It does not appear from our record that the prosecutor was referring to any discoloration in the projection of the photograph as evidence of a dent. (The prosecutor did not, for example, ask Jackson to point out the dent with the pointer or ask Jackson what is shown

in the discolored area of the projected photograph.) We conclude, therefore, that the record does not disclose that the prosecutor committed misconduct with respect to the projection of the photograph or in her questioning of Jackson regarding the photograph or the purported dent.

For the foregoing reasons, we conclude that there was no prejudicial misconduct by the prosecutor and defendant was not deprived of a fair trial.

### III. DISPOSITION

The judgment is affirmed.

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/s/ King  
J.

We concur:

/s/ McKinster  
Acting P.J.

/s/ Richli  
J.